UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/392
18 April 1994

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-seventh session
New York, 31 May-17 June 1994

REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER ON THE WORK OF ITS SEVENTEENTH SESSION (New York, 14-25 March 1994)

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). It devoted its eleventh to fifteenth sessions to the preparation of the Model Law on Procurement of Goods and Construction (the reports of the tenth to fifteenth sessions are contained in documents A/CN.9/315, 331, 343, 356, 359 and 371). The Working Group decided that it would be preferable to first finalize provisions for the procurement of goods and construction before elaborating such provisions for the procurement of services (A/CN.9/315, para. 25). A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and construction. The UNCITRAL Model Law on Procurement of Goods and Construction was adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993).

2. At that twenty-sixth session, on the basis of a note on possible future work on the procurement of services prepared by the Secretariat (A/CN.9/378/Add.1), the Commission agreed to undertake work in the area and entrusted the preparation of draft model legislative provisions on the procurement of services to the Working Group. The Commission agreed that the Working Group should finalize its work on draft model provisions on procurement of services in time for consideration by the Commission at its twenty-seventh session.

3. At its sixteenth session held at Vienna from 6 to 17 December 1993, the Working Group reviewed the Model Law in order to identify possible amendments that would enable the Model Law to encompass procurement of services. The Secretariat was requested to prepare a revised version of the Model Law reflecting the deliberations and decisions that had taken place.

4. The Working Group, which was composed of all States members of the Commission, held its seventeenth session in New York from 14 to 25 March 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Bulgaria, Canada, China, France, Germany, Iran (Islamic Republic of), Japan, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Slovakia, Spain, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Colombia, Cyprus, Holy See, Mongolia, Myanmar, Panama, Republic of Korea and Switzerland.

6. The session was also attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Inter-American Development Bank and International Bar Association.

7. The Working Group elected the following officers:

Chairman: Mr. David Moran Bovio (Spain)

Rapporteur: Mr. Abbas Safarian (Islamic Republic of Iran)

8. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.39);

(b) Draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services (A/CN.9/WG.V/WP.40);

(c) Report of the Working Group on the New International Economic Order on the work of its sixteenth session (A/CN.9/389);

(d) Procurement of services: Note by the Secretariat (A/CN.9/378/Add.1);

(e) Procurement: draft model legislative provisions on procurement of services: Note by the Secretariat (A/CN.9/WG.V/WP.38);

(f) UNCITRAL Model Law on Procurement of Goods and Construction; 1/

(g) Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393).

9. The Working Group adopted the following agenda:

1. Election of officers;

2. Adoption of the agenda;

3. Model legislative provisions on procurement of services;

4. Other business;

5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

10. The Working Group reviewed the draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction designed to encompass procurement of services as set forth in the text of document A/CN.9/WG.IV/WP.40. After concluding its deliberations, the Working Group requested the drafting group to prepare a draft revised version of the Model Law reflecting the deliberations and decisions that had taken place. The deliberations and decisions of the Working Group are set forth below in chapter II of the present report. The report of the drafting group containing the text of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services as agreed by the Working Group is set forth in the annex to the present report.

II. CONSIDERATION OF DRAFT AMENDMENTS TO THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

A. General remarks

11. The Working Group commenced its work by considering further the question of the form of the model statutory provisions on procurement of services, a matter that had been considered but not finally disposed of at the sixteenth session (A/CN.9/389, para. 11). In that regard, the view was expressed that the mandate of the Working Group, in particular the possible desire of some enacting States to have a free-standing model dealing with procurement of services, 2/ would best be fulfilled by the formulation of a completely free-standing model law dealing exclusively with the procurement of services. It was stated that such an approach would have the advantage of underscoring the distinct and more complex character of much of the procurement of services. It was also suggested that a separate treatment would limit any adverse effect on the impact and clarity of the existing Model Law in the spheres of goods and construction. Another possible benefit cited was that completely separate treatment would avoid the added appearance of complexity that might result from an attempt to interpolate provisions on services into the existing Model Law.

12. While recognizing the concerns underlying the above proposal of separate treatment, the Working Group decided, as it had at the sixteenth session, that the consolidated approach reflected in the draft text before it was preferable for a number of reasons. Beyond the concern that the proposed separate approach would not be advisable or feasible in view of the limited time available, a number of other grounds were cited for the decision. Those included that, at the national level, many if not most States traditionally dealt with procurement of goods, construction and services in a consolidated legal text, a practice that was likely to continue and of which the Model Law needed to take account. It was suggested that to do otherwise would leave such States with insufficient guidance and would open a window for perhaps unnecessary and harmful departures from the principles embodied in the Model Law. The decision of the Working Group in favour of a consolidated approach was also grounded in a recognition that most of the provisions of the Model Law were in substance also applicable to the procurement of services, a factor that would render the provisions in a separate model for services largely redundant of the Model Law.

13. With regard to a possible desire by some enacting States for a separate treatment of procurement of goods or construction and of procurement of services, it was understood that the revised text being prepared would leave intact the Model Law as it had been adopted by the Commission and recommended by the General Assembly, with a scope limited to procurement of goods and construction.

14. Notwithstanding its preference for a consolidated model statute dealing with goods, construction and services, the Working Group felt that the concerns that had been raised with regard to such an approach needed to be addressed by a more distinct treatment of procurement of services within the Model Law than was apparent in the draft text before it, which reflected the approach agreed upon at the sixteenth session. It was agreed that such a more distinct, clearer treatment of services could be achieved by including in the Model Law a separate

chapter dealing with procurement of services, an approach that had been suggested at earlier stages (see the proposal in A/CN.9/378, and the discussion at the sixteenth session reported in A/CN.9/389, para. 11).

15. The Working Group noted that its decision on the contents of the separate chapter, as well as the identification of the provisions that would be applicable to the procurement of goods or construction as well as to the procurement of services, would have to be considered as part of the article-by-article review of the draft amendments to the Model Law in which the Working Group was about to engage. There was general agreement, however, that the separate chapter would at the least have to contain the special procedures of request for proposals for the procurement of services, currently set forth in article 39 bis. It was noted that it might be helpful to divide that currently lengthy provision into several shorter articles. As had been decided at the sixteenth session (A/CN.9/389, paras. 37-44), the procedure in article 39 bis would continue to be the preferred method for procurement of services, except in cases falling within the conditions for use of tendering in the case of services, or in cases subject to procurement by other methods. It was not clear at that stage of the deliberations, however, whether that aspect should be dealt with in articles 16 and 17 of chapter II, or as a part of the separate chapter on services.

B. Title

16. The Working Group considered further whether the expanded text should be entitled simply "UNCITRAL Model Law on Procurement", or whether it would be preferable to use a more explicit title, "UNCITRAL Model Law on Procurement of Goods, Construction and Services". A concern was raised that the shorter reference, only to "procurement", was unclear and would create uncertainty, since a model statute had already been adopted by the Commission dealing with procurement, albeit with procurement of goods and construction and not of services. The concern was raised in particular that such a general title might compound an impression that the Model Law covered transactions not intended to be covered, an impression that might already be drawn from the open-ended nature of the definition of "services" in article 2 (d bis). A countervailing view was that a simple reference would accurately reflect the scope of the Model Law.

17. The suggestion was also made that, in order to avoid confusion with the existing Model Law on Procurement of Goods and Construction, it might be more appropriate to reflect the full contents of the revised Model Law that would contain provisions on services by using the title "UNCITRAL Model Law on Procurement of Goods, Construction and Services". A suggestion to differentiate the revised Model Law by referring to its year of adoption was objected to on the grounds that, in some jurisdictions, legislation was not referred to by year of adoption, unless it was superseding earlier legislation on the same subject-matter.

18. Noting that similar questions of terminology would arise at other points in the Model Law, beginning with the preamble, the Working Group decided to defer a decision on the title. The Working Group also noted the observation that the

Guide to Enactment should include an explanation in this context of the drafting history and scope of the Model Law.

C. Preamble

19. In the light of concerns similar to those raised in the discussion of the title, the Working Group expressed a preference, in both the chapeau and subparagraph (c), for the expression "procurement of goods, construction and services", rather than for the shortened reference just to "procurement".

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

20. It was pointed out that in the Guide to Enactment, there should be a very clear explanation as to why the Working Group decided that it would not be practicable to indicate the types of procurement that would not be subject to the Model Law and that it should be left to States to specify any such procurement in their law or in the procurement regulations. It was stated that the principal reason behind this decision was that States differed significantly in regard to the types of acquisitions that were not subject to public procurement rules.

21. A suggestion was made to delete the word "all" in subparagraph (1). It was explained in support of the proposal that that word might be misleading since the intention was not to make each and every procurement subject to the Model Law. The proposal was referred to the drafting group.

Article 2. Definitions

Subparagraph (a) ("procurement")

22. A view was expressed that the words "for compensation" did not properly reflect the intended limitation in the definition and that it might be preferable to use the words "for reward". It was, however, pointed out that the limitation of the definition of procurement to cases involving payment was not proper; it was suggested instead that the nature of the procurement should determine whether it would be excluded from the Model Law. The Working Group therefore decided to define procurement as "acquisition by any means of goods, construction or services".

Subparagraph (b) ("procuring entity")

23. No changes were suggested with regard to subparagraph (b).

Subparagraph (c) ("goods")

24. It was noted that, in the definition of "goods", the word "including" appeared twice and that the drafting group should consider a formulation that

avoided this repetition. A suggestion was made that using such words as "and includes" could solve the problem.

Subparagraph (d) ("construction")

25. It was pointed out that the reference to incidental services in the procurement of construction should be aligned with the reference to incidental services in the procurement of goods. This would make it clear that the value of the incidental services would have to be lower than that of the construction, if the procurement contract was still to be considered as one of construction.

Subparagraph (d bis) ("services")

26. A number of concerns were raised regarding the definition of services as found in subparagraph (d bis). One of the concerns was that the definition was very broad and probably encompassed more than was intended. The acquisition of real estate, purchase of intellectual property rights and public employment contracts were given as examples in this regard. One remedial suggestion was to specifically exclude the acquisition of real estate and public service contracts from the Model Law, either in article 1 or in the definition of services. In opposition to this suggestion, it was pointed out that the Working Group had already decided that, except for procurement involving national defence or security, no other specific exclusions would be made in the Model Law and that any other exclusions could be made by the enacting State under article 1.

27. Objections were also raised with regard to the use of the word "product" to define services, as it was seen to be overly oriented towards tangible goods. The word "anything" was also not generally acceptable for similar reasons.

28. Various proposals were made as to how to deal with the problems raised. One proposal was to append an annex to the Model Law listing either services to which the Model Law would apply, or perhaps listing instead those to which it would not apply. That proposal did not receive support as it was found to be overly complicated and difficult to implement. It was also stated that the Working Group had already decided not to make reference to any specific types of services in the Model Law. A suggestion to delete the definition also did not receive support on the basis that this could leave a gap which might lead to uncertainty as to the scope of application of the Model Law. A proposal that received some support was to define "procurement of services" as opposed to defining "services" themselves. It was suggested that such a definition could read as follows: "procurement of services" means any act of procurement which is not the procurement of goods or construction. That proposal was, however, also not generally acceptable as it might raise a drafting anomaly since there was already a definition of "procurement". It was suggested that that concern might be addressed by including a separate paragraph in article 2 stating that, for the purposes of the Model Law, a reference to procurement of services meant any act of procurement that was not the procurement of goods or construction. That suggestion did not receive sufficient support.

29. Another approach proposed was to provide some examples of what could be considered services and to leave it to the enacting States to refer to additional categories of services if it so wished. Such an approach, however,

was objected to as it involved making reference to specific services, something which the Working Group had decided to avoid. Yet another proposal was to make provision for the enacting State to stipulate in the law the categories of services that would be covered under its law. That proposal also did not receive sufficient support as it did not provide an actual definition and could have the unintended effect of providing enacting States with the possibility of further limiting the scope of application of the Model Law.

30. It was observed that the intention of the Working Group should be to provide a simple definition to the effect that any procurement that did not involve the procurement of goods or construction would be a procurement of services. It was therefore proposed that such a definition could read as follows: "'services' means any object of procurement other than goods or construction." This could be coupled with a clarification in the definition of "goods" that goods meant physical objects. It was pointed out, however, that it might not be appropriate to refer to physical objects in the definition of "goods" as this might lead to confusion as to whether some goods, for example electricity, were physical objects. Apart from that concern, the latter proposal was found to be generally acceptable and was referred to the drafting group.

Articles 3 to 5

31. No comments were made on articles 3 to 5, entitled: International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]; Procurement regulations; and Public accessibility of legal texts.

Article 6. Qualifications of suppliers and contractors

Paragraph (1)

32. The Working Group exchanged views on the words "necessary professional qualifications, professional and technical competence". One view was that the expression might be shortened for purposes of economy in drafting by removing the adjectives "professional" and "technical". However, the Working Group affirmed the decision taken at the sixteenth session to include wording along the above lines (A/CN.9/389, paras. 84 and 85). It was further agreed that the expression should be partially modified by replacing the words "necessary professional qualifications" by the words "necessary professional and technical qualifications".

33. The Working Group noted an observation that the Guide to Enactment might usefully explain that the expression "possess ... personnel" was not intended to indicate the manner in which suppliers and contractors should engage personnel, since in particular it was not meant to suggest that suppliers and contractors could not hire specialized staff in response to the award of a procurement contract in order to carry out that contract.

Paragraphs (2) to (4)

34. No comments were made on paragraphs (2) to (4).

Paragraph (5)

35. A view was expressed that the proviso at the end of the paragraph, prohibiting discriminatory measures that were not objectively justifiable, needed to be strengthened in order to remove obstacles to participation by service providers in procurement proceedings. A specific example cited was the case of "establishment" requirements, which required suppliers and contractors to establish a business entity in the State of the procuring entity or to hold assets there. The concern was expressed that the notion "not objectively justifiable", while not objectionable in itself, would not be universally understood as dealing with obstacles that might be encountered by service providers. For example, the question was raised whether the mere fact that an obstacle to participation such as an establishment requirement was enshrined in the law would render the requirement "objectively justifiable".

36. The prevailing view was that the Model Law should not venture any further into the matter beyond what was stated in the existing wording and that to do so would exceed the scope of the Model Law. It was pointed out in support of the prevailing view that important questions of public policy and protection of the public interest might underlie requirements imposed on service providers, for example, that insurance or financial companies maintain a requisite amount of assets within the jurisdiction of the enacting State.

37. As to the drafting of the remainder of paragraph (5), a proposal was made to delete the words "with respect to the requirements" as unnecessary. That suggestion was referred to the drafting group.

Article 7. Prequalification proceedings

Paragraphs (1) and (2)

38. No comments were made on paragraphs (1) and (2).

Paragraph (3)

39. The Working Group noted that paragraph (3) had been modified in response to the decision at the sixteenth session to review the paragraph in view of the fact that the provisions on prequalification proceedings were meant to have general applicability, irrespective of the method of procurement (A/CN.9/389, para. 90). It was observed that the modified version referred, in addition to tendering proceedings, to request-for-proposals proceedings and to the special procedures for services under article 39 bis, though not to competitive negotiation. Questions were raised as to whether the provisions of paragraph (3) should be assumed to have across-the-board applicability to methods of procurement other than tendering, in particular since some of the information that was required to be included in prequalification documents in the context of tendering proceedings would not necessarily be relevant or

available in the context of those other methods of procurement, in particular competitive negotiation. One suggestion for dealing with these considerations was to retain the availability of prequalification proceedings for methods of procurement other than tendering, but to exclude the mandatory application of paragraph (3) to prequalification in the context of those other methods. The Working Group formed a small working party to consider that proposal and deferred a decision on paragraph (3). (The decision of the Working Group on the latter question is reflected in article 7 (3) in the annex.)

40. As a matter of drafting, it was pointed out that the reference in paragraph (3) (a) (ii) to article 38 (4) (a) should be to article 38 (4) as a whole. It was also suggested that in the same provision the reference to "request for proposals" should instead be a reference to "request-for-proposals proceedings".

Article 8. Participation by suppliers or contractors

41. No comments were made on article 8.

Article 9. Form of communications

42. It was noted that the reference in paragraph (2) to article 33 (3) should be changed to refer to article 11 bis (3). It was also noted that it might be necessary to include mention of certain communications pursuant to article 39 bis, depending upon the result of the deliberations concerning that article.

Article 10. Rules concerning documentary evidence provided by suppliers and contractors

43. No comments were made on article 10.

Article 11. Record of procurement proceedings

44. It was suggested that the current formulation failed to meet the concern that had been raised earlier that paragraph (1) (d) seemed to give undue prominence to the price (A/CN.9/389, para. 33), since, for example, in requests for proposals and competitive negotiations some suppliers and contractors would not have the opportunity to present a best and final offer containing a price. It was suggested in response, however, that, since article 11 was essentially a record-keeping provision, in those instances where a tender, proposal or offer did not involve a price, there could be no obligation to record a price. It was suggested that the drafting group consider using words such as "if known," in relation to the price. It was also agreed that the drafting group should replace the words "price-determining formula" with words that better described those instances where the tender, proposal, offer or quotation did not contain a price but contained a mechanism by which the price would be calculated.

45. It was noted that the cross-reference in paragraph (1) (e) to article 39 bis (5) (e) should be to article 39 bis (4) (c), and that the cross-references in paragraph (1) (f) to article 33 and 33 (1) should be to article 11 bis and 11 bis (1), respectively.

Article 11 bis. Rejection of all tenders, proposals or offers

46. No comments were made on article 11 bis.

Article 11 ter. Entry into force of the procurement contract

47. A proposal was made for the deletion of paragraph (2), which provided that the procuring entity should disclose the manner of entry into force of the procurement contract in the documents for solicitation of proposals, offers or quotations. It was pointed out that this proposal would actually entail the deletion of article 11 ter in its entirety, since paragraph (1) merely referred to article 35. In support of the proposal, it was stated that, since entry into force of procurement contracts awarded using methods of procurement other than tendering would be governed by local law, the procuring entity should not be burdened with notifying details of law. It was also suggested that procuring entities would comply with any such requirement by including only a general reference to local law, which would be of little use to suppliers or contractors. In support of the provision, it was recalled that the earlier deliberations of the Working Group had been aimed at an attempt to have rules on entry into force that would apply to all methods of procurement (ibid., para. 142). It was observed that, from the perspective of transparency, especially for foreign suppliers and contractors, it would be important for the information on entry into force of the procurement contract to be disclosed and that this did not necessarily entail an undue burden on the procuring entity. After deliberation, the Working Group decided to defer a decision on article 11 ter until it had reviewed article 39 bis. (For further discussion on article 11 ter, see para. 118.)

Articles 12 and 13

48. No comments were made on articles 12 and 13 entitled: Public notice of procurement contract awards; and Inducements from suppliers or contractors.

Article 14. Rules concerning description of goods or construction

49. It was noted that a reference to services would be added to the title.

Article 15. Language

50. It was noted that the words "goods or construction" in subparagraph (b) would be replaced by the words "goods, construction or services".

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. Methods of procurement

51. It was suggested that, consequent to the earlier decision of the Working Group to have a chapter dealing exclusively with services, it might be necessary to restructure chapter II in particular in view of the decision to add a special chapter on services, and that such a restructuring should be agreed on prior to the review of article 16. Various proposals were made in that direction.

52. One proposal was to limit chapter II only to goods and construction, and to deal in the special chapter on services with all aspects of procurement of services, reflecting there the changes agreed on at the sixteenth session. A variation of that proposal was to repeat, in the chapter on services, all the provisions on conditions for use, appropriately modified, for the methods of procurement currently available for goods and construction. However, that was objected to as needlessly repetitious, since most of the procedures would be virtually identical.

53. Another proposal was to have a chapter dealing with conditions for use for methods of procurement that would be applicable to goods, construction and services, followed by one chapter dealing with those procurement procedures that would be common to goods, construction and services, and by another chapter dealing with those procedures that would be available only for services. The latter would essentially consist of the procedures currently in article 39 bis.

54. In support of yet another approach, the view was expressed that a desirable degree of simplicity might be achieved by not making available for services competitive negotiations or request for proposals, since the essential elements of those two methods were already found in article 39 bis. This was objected to, however, on the basis that those methods were substantially different from the procedures in article 39 bis. In particular, request for proposals and competitive negotiations dealt with cases in which the procuring entity did not know the nature of the technical solution to its procurement needs, while article 39 bis was geared to cases in which the procuring entity attached particular weight to the qualifications and abilities of the service provider. A suggestion to include wording applying to services all the methods of procurement available for goods and construction mutatis mutandis was also objected to on the basis that it could lead to uncertainty and disputes.

55. After deliberation, the Working Group decided, rather than to continue at that stage with consideration of the form and content of chapter II, to proceed to a discussion of the contents of the separate chapter on services, in particular article 39 bis. (The resumed discussion of article 16 is reported in paras. 85 to 95.)

Article [39] bis. [Request for proposals for services] [Special procedures for request for proposals for services] [Special procedure for procurement of services]

56. It was pointed out that the title of the article should be formulated so as to avoid confusion with article 38 on request for proposals for goods and

construction. It was also agreed to request the drafting group to divide the article into a number of separate articles, while grouping those articles in one section, a restructuring relevant to the question of titles. No final decision was reached, however, as to whether to use the term "request for proposals for services" or another formulation.

Paragraphs (1), (2) and (3)

57. A proposal was made that, in line with similar provisions on solicitation of tenders, it would be important to provide for the publication of a notice of the intended procurement of services in advance of the distribution of the request for proposals. The essential elements of that proposal were: publication of such a notice "[15] days" before issuance of the request for proposals; requirements as to the contents of such a notice; international publication of the notice; issuance of the request for proposals or the prequalification documents and the charges for them, if any; and the possibility of direct issuance of the request for proposals and the prequalification documents to suppliers or contractors who the procuring entity believed would be interested in such a procurement, for which the procuring entity might wish to employ mailing lists.

58. The Working Group agreed that there would be a need to make provision for the issuance of such a notice. There was, however, a prevailing view that such a provision should not introduce any new elements that were not provided for in the solicitation of tenders and that it should be aligned as closely as possible with similar provisions in the Model Law on tendering proceedings. Doubts were raised in particular with regard to the time-limit for the issuance of the notice and to the requirement that the procuring entity provide its telephone number in the notice and the reference to direct solicitation, especially if it involved the use of lists. After deliberation, the Working Group agreed to delete those elements from the proposal and referred it to the drafting group.

59. The Working Group accepted and referred to the drafting group a suggestion that there should be a cross-reference in paragraph (2) to article 8, as another instance in which the procuring entity might limit publication of the invitation for proposals to domestic suppliers and contractors. It was noted that a similar provision was found for tendering in article 21 (a).

60. A suggestion was made that, in paragraph (3), the words "may disregard" were overly strict and that using language such as "need not comply with" might be preferable. The suggestion was accepted and referred to the drafting group.

61. The view was expressed that, also in paragraph (3), there was no need to list in such detail all those instances in which the procuring entity could disregard paragraphs (1) and (2). It was suggested that a provision referring to "reasons of economy and efficiency" would be adequate. In objection to that view, it was stated that the Working Group and the Commission had restricted the usage of that expression in other provisions and that, because of its potential ambiguity, it would therefore not be appropriate in the present case.

Paragraph (4)

62. Differing perspectives were aired as to the adequacy of the treatment afforded by paragraph (4) to the contents of the request for proposals, particularly when compared with the much more comprehensive analogous provision in tendering proceedings (article 25). One view was that, since article 39 bis represented the predominant method in the procurement of services, a more comprehensive, rule-based approach would have to be followed that would lead to a certain extent to the expansion of article 39 bis. At the same time, the concern was raised that adding to the existing provisions would make the Model Law appear more complex and would have the unintended effect of discouraging use of the procedures in article 39 bis. Another factor cited in favour of retaining the existing, more limited approach was that the chapeau of paragraph (4) made it clear, by using the words "at least", that there might have to be additional information provided in the request for proposals. A further observation was that some of the other parts of article 39 bis might already allude to matters that would have to be pre-disclosed to suppliers and contractors in the request for proposals.

63. Apart from the concerns that had been raised as to adding to the length of article 39 bis, there was broad agreement that much of the information required by article 25 to be included in solicitation documents in the context of tendering should, by analogy, be included in the request for proposals for services. Those elements of article 25 that were said to be probably not relevant included subparagraphs (l), (m), (p), and possibly (v). With regard to the drafting of the current text of paragraph (4), there was considerable sympathy for a suggestion to delete in subparagraph (b) the reference to the location of "delivery" of services, and to refer instead merely to the location of the "performance". It was felt that the current formulation, though intended to address the concern about unnecessary obstacles to participation by foreign service providers (A/CN.9/389, paras. 105-107), was not clear. It was also pointed out for the attention of the drafting group that, whereas article 25 (e) spoke of "factors", article 39 bis spoke of "criteria".

64. Various types of approaches were considered as to the precise form that the expansion of the scope of paragraph (4) should take, approaches that differed in particular as to the extent to which they would add to the length of the provision. One relatively minimal approach was to include in paragraph (4) merely an indication for the procuring entity that there might be additional elements to be included in the request for proposals for services analogous to the elements of article 25 not currently referred to in paragraph (4). Such an approach, as well as other forms of cross-referencing, were objected to on grounds of style. At the other end of the spectrum of possible approaches was the suggestion that the elements of article 25 that were by analogy relevant to article 39 bis should be listed in article 39 bis. An approach occupying a more middle ground and designed to avoid a substantial increase in the length of the provision was to include a relatively compressed, summary mention of other relevant elements to be included in the request for proposals for services. As the latter type of approach was considered to be of doubtful adequacy or feasibility, the Working Group considered a proposal for a more detailed version of paragraph (4), based essentially on a recitation of the types of elements to

be contained in solicitation documents in tendering proceedings pursuant to article 25.

65. While some hesitation was expressed concerning the length of the proposed text and its ability to distinguish adequately procurement of services, the Working Group generally accepted the proposal and referred it to the drafting group. It was noted that the requirements in the proposal concerned essentially "ministerial" or "housekeeping" types of basic information that would be relevant irrespective of whether goods, construction or services were being procured.

66. The Working Group noted for the attention of the drafting group a number of concerns and questions that had been raised, including: that the term "suppliers or contractors" should be used instead of "proposers"; whether adequate notice of negotiation was built in for cases in which a negotiation procedure was selected by the procuring entity pursuant to either paragraphs (12) or (13) of article 39 bis; the possible inappropriateness of using in article 39 bis the word "opening", as well as the concept of "place" of opening of proposals, since those expressions might connote aspects of public opening relevant to tendering proceedings, but not to the procedures in article 39 bis; that words such as "where it is required that a price or rate be given" might be added to the beginning of the reference to price, so as to avoid giving undue prominence to price and to avoid suggesting that price always would be a criterion; that, to the extent possible and appropriate, the formulation of the provisions under consideration should be patterned on the analogous provisions for tendering in article 25; the replacement of the term "request for proposals" by the term "solicitation documents", though that suggestion did not appear to attain broad support.

Paragraph (5)

67. Various possible approaches were considered as to whether the use of any or all of the evaluation criteria listed should be mandatory or optional, and as to whether the procuring entity should be permitted to apply criteria other than those listed in paragraph (5). After pausing for some time to consider possible grounds for making at least subparagraphs (a), (b) and (c) mandatory, the Working Group affirmed that the intent of paragraph (5) was to limit the scope of permitted criteria, without requiring the use in all cases of all those criteria. Such an approach was felt to be consistent with the Working Group's understanding of other, similar provisions in the Model Law. It was felt that the words "the criteria shall concern" at the end of the chapeau did not adequately portray that understanding and needed to be reviewed by the drafting group. The Working Group was also of the view that it could usefully be made clear already in paragraph (5), rather than waiting for paragraph (9), that the procuring entity was precluded from applying criteria not predisclosed to suppliers or contractors in the request for proposals.

68. Turning to the content of paragraph (5), a view was expressed that subparagraph (d), which referred to possible "socio-economic" evaluation criteria, could be deleted. The Working Group was of the view, however, that such a provision, which appropriately might not be found in an international convention dealing with reciprocal trade benefits in procurement, was an

inevitable prerogative of States that would invariably be recognized at the level of national law. It was noted that for the same considerations a similar provision had been included for tendering in article 32(4)(c)(iii). A proposal to include a reference to approval by a "designated authority" for the use of criteria listed in subparagraph (d) did not receive sufficient support. The Working Group did agree, however, in particular for purposes of symmetry with article 32(4)(c)(iv), to add as an additional criterion in paragraph (5) national defence and security.

69. Suggestions referred to the drafting group included to combine paragraph (6) with paragraph (5), and to review the formulation of subparagraph (c), since it had been pointed out that, literally speaking, the "price submitted" was not itself the "criterion".

Paragraph (6)

70. The Working Group agreed to refer to the drafting group a suggestion that paragraph (6) should be combined with paragraph (5).

Paragraph (7)

71. It was pointed out that paragraph (7) (a) did not specify the period within which the procuring entity should respond to requests for clarifications or the period of time within which it was to transmit modifications of the request for proposals to suppliers or contractors. It was further pointed out that, in article 26, the issue of clarifications and modifications of solicitation documents in tendering proceedings was dealt with in more detail. A suggestion that it would be preferable to align paragraph (7) with article 26 was accepted and referred to the drafting group.

Paragraph (8)

72. The Working Group accepted and referred to the drafting group a suggestion that paragraphs (8) and (14) should be combined into one paragraph dealing with the issue of confidentiality.

Paragraph (9)

73. Consequent to the decision that the requirement to disclose criteria in the request for proposals should be in paragraph (5), the Working Group was of the view that paragraph (9) could be incorporated in paragraph (10).

Paragraph (10)

74. A proposal was made that paragraph (10) should also provide that the procuring entity may use a jury or panel of outside experts in the selection process. In support of the proposal, it was stated that selection of the successful proposal by a panel of experts was a procedure that was used in practice, particularly in the adjudication of "design contests". It was pointed out that such a procedure was provided for in the European Union Directive relating to the coordination of procedures for the award of public service contracts. It was suggested that such a provision could be incorporated in the

existing machinery of selection and would not necessitate another method of selection of the successful proposal. It was also suggested that a provision on the matter in paragraph (10) would be limited to establishing norms governing the composition and impartiality of the selection panels.

75. Various concerns were expressed, however, concerning the proposal. A view was expressed that there was no need to have such a provision since, if the procuring entity wished to use "design contests", it could do so under the existing provisions of the Model Law. Another concern raised was that having such a provision only in article 39 bis but not in the procurement methods for goods and construction would appear to limit the use of selection panels to the procurement of services, which would be counter to practice. Furthermore, it was stated, a distinction would have to be made between those panels whose role was merely advisory and those empowered to make a decision that would be binding on the procuring entity, and also between panels whose role would be limited to the aesthetic and artistic aspects of proposals and those that would have a wider role.

76. After deliberation, the Working Group was of the view that such a provision on selection by an outside panel of experts should be included in paragraph (10), provided it was limited to recognizing that the procuring entity had the right to use impartial panels in the selection of proposals. A draft proposal generally along these lines was presented and referred to the drafting group. Particular interest was expressed in a formulation to the effect that "nothing in the Model Law" prevented the use of impartial panels in the selection process. (For a further discussion on the use of selection panels see para. 125.)

Paragraphs (11), (12) and (13)

77. The Working Group agreed that the word "shall" in paragraphs (11), (12) and (13) was inappropriate as it created the impression that the use of all three methods of selection was required, when in fact the procuring entity would only employ one of them. It was agreed that the drafting group would craft a formulation that made clear the optional nature of the methods of selection.

78. A concern was raised that, if in accordance with paragraph (13) (b) proposals were ranked only on the basis of their technical and quality merits, some suppliers and contractors would inflate the technical and quality aspects of their proposals beyond what was needed by the procuring entity to meet its needs, so as to obtain a high ranking and thus be in a position to be first to negotiate with the procuring entity. It was pointed out that this would place the procuring entity at a disadvantage, since it would have to negotiate a price for the inflated proposal. The Working Group noted that the rating was intended to involve all aspects of the proposals, including their "effectiveness" in meeting the needs of the procuring entity, so that procuring entities would be able to take into account the possibility of technical overloading of proposals and deny on that ground a high rating for such proposals. It was agreed that paragraph (13) (b) should be redrafted to reflect this understanding.

79. The Working Group also discussed whether the threshold level would be applicable to paragraph (12) so as to make the method more strict. This was

objected to on the basis that it might make paragraph (12) so strict as to be of little attraction to procuring entities. A question was raised as to whether paragraph (12) did not already presuppose a threshold, as it provided that negotiations would only be held with those suppliers and contractors whose proposals had not been rejected. It was suggested, however, that the rejection referred to would be on the basis of a failure to satisfy a basic criterion such as a professional qualification and not necessarily on the basis of a full technical review of the proposals. Another suggestion of a drafting nature was that, since the threshold level was applicable to both paragraphs (11) and (13), paragraph (11) (a), which provided for the threshold, could be placed in a separate paragraph.

80. With regard to paragraph (13), a question was raised as to whether a procuring entity could, after negotiating in sequence with a number of suppliers or contractors, return to conclude the procurement contract with a supplier or contractor higher up the ladder with whom it had terminated negotiations at an earlier stage, if it considered that its needs would be better served by doing so. Concerns were expressed that, by not allowing for such a possibility, paragraph (13) would place procuring entities into the position of selecting suppliers and contractors who did not necessarily represent the best value for the money. It was generally felt, however, that in not providing the procuring entity with the ability to reopen negotiations with suppliers and contractors, paragraph (13) instilled an important discipline in the procurement proceedings and avoided open-ended negotiations, which could lead to abuse and cause needless delay. It was agreed that the Guide to Enactment should make it clear that the intended effect of paragraph (13) was to instil this discipline in the procurement process.

81. Another question that arose in regard to paragraph (13) was whether the negotiations should be limited only to the price or whether they should also cover other aspects of the proposals, as the provision currently stated. Support was expressed for limiting the negotiations under paragraph (13) only to the price on the grounds that the proposals had been rated on the basis of common criteria and that negotiations on aspects other than the price might result in violation of the principle of common criteria. However, it was pointed out that in practice such negotiations in the type of procedure under paragraph (13) were not limited strictly to the price. It was further stated that, since paragraph (13) now represented the main method of selection for those services where the emphasis was the qualifications of the suppliers or contractors, the provision should not be limited in a way that would make it difficult for procuring entities to use. Suggestions were made that negotiations could be limited in a more flexible fashion, for example by limiting negotiations to "price-related" aspects of the proposals. After deliberation, the Working Group deferred a decision on the matter until it had further considered the prevailing practice.

82. In resuming its earlier deliberations on the matter of the scope of negotiations under article 39 bis (13)(b) (see discussion above in para. 81), the Working Group was again cautioned that negotiation under the special type of procedure provided for in article 39 bis (13) should be limited to price. At the same time, the Working Group was urged to recognize that, in practice, negotiations inevitably would have to take place on matters other than price,

whether or not a form of a contract had been attached to the request for proposals, if for no other reason than that questions of price would invariably implicate terms of the contract. Suggestions were made to find a middle ground, one that would provide for the needs of practice without opening up the negotiations excessively to the point of rendering the proceedings unfair to other suppliers or contractors. One such proposal was to refer to issues relating to the "resolution of the contract". The prevailing view, however, was that the suggested modifications did not provide added clarity and that, lacking a better expression, it would be preferable to retain the words "or other aspects". (For further discussion on this issue see para. 128.)

83. Various proposals of a drafting nature were also made. In particular it was suggested that, if paragraph (12) was intended to represent the "two envelope" system, it should be more specific. It was also suggested that there should be a clearer reference in paragraph (13) to the procedures for entry into force of the procurement contract as it was this provision that had prompted the Working Group to consider inclusion of article 11 ter. It was also agreed that the drafting group would consider whether to use the word "factors" or the word "criteria" throughout article 39 bis.

Title of new procurement method for services

84. The Working Group took up the question of the general name to be given to the procurement method set forth in article 39 bis. The Working Group recognized that each of the possible formulations presented in the title of article 39 bis would have advantages and disadvantages. For example, the term "special procedure for procurement of services" had the advantage of being distinct from "request for proposals", which was a term associated with a procurement method in the existing Model Law (article 38). It was said that the use of a new expression would help to highlight the distinct character of the procurement method being added for services. The term "request for proposals", on the other hand, had the advantage of being a fairly familiar term and in that way might help to make the Model Law more "user-friendly." After deliberations, the Working Group decided to opt for the term "request for proposals for services", and to reflect this in the title of the separate chapter that would contain the provisions set forth in article 39 bis.

Article 16. Methods of procurement

85. After having considered article 39 bis (see paras. 55 to 84), the Working Group returned to its deliberations on article 16 in particular and on chapter II as a whole, from the standpoint of how best to use those provisions as a steering mechanism to guide procuring entities to the procurement method to be used in any given case of procurement of services.

86. At that point in the discussion, the initial question was one of structure, namely whether chapter II should be such a steering mechanism only for procurement of goods or construction, with a steering mechanism for services (i.e., what was in paragraph (3) of article 16) being located in another part of the Model Law, for example in the separate chapter on services into which it had been decided to place article 39 bis. A suggestion was made that went even further in the direction of separate treatment of conditions for use of

procurement methods in the context of goods or construction on the one hand, and in the context of services on the other. That suggestion was to recite, also in a separate chapter, the conditions for use under which the procurement methods in articles 18 to 20 would be available for procurement of services, even though that might be largely repetitious, on the grounds that it might not be fully feasible to draft those conditions in a manner sufficiently general to encompass both goods or construction and services. An example cited in the latter regard was article 19 (1). Suggestions for a separate type of approach were motivated in particular by a desire to added clarity in distinguishing procurement of services and to limit modification of the existing text of the Model Law.

87. Another variation of the proposal on separate treatment also involved providing for the methods of procurement and their conditions for use for goods and construction and for services in different parts of the Model Law, but without providing for the use of two-stage tendering, competitive negotiations and request for proposals for services. In this proposal, the conditions for use of tendering for services would require that the services be of a standardized nature for which the price was the most significant aspect, the conditions for use for restricted tendering and request for quotations would be similar to, while those for single-source procurement would be the same as, for conditions for goods and construction.

88. Some interest was expressed in that proposal, in particular since it did not provide for the use of two-stage tendering, competitive negotiations and request for proposals for services. However, objections were raised with regard to the conditions for use that were proposed for tendering for services on the basis that tendering should be made available even in those instances where price was not necessarily the most significant aspect. There was also an objection to combining the conditions for use for restricted tendering and request for quotations since these methods were meant for distinctly different circumstances.

89. In yet another proposal on the structure, all the methods of procurement that were available for goods and construction would have been maintained also for procurement of services. According to that proposal, however, all the provisions dealing exclusively with procurement of services would be placed in a separate part of the Model Law, set apart from those dealing with goods and construction, but still subject to the provisions dealing with methods of procurement common to goods and construction and for services.

90. The prevailing view, however, was that, at least at the current stage, it would be preferable to follow an approach in article 16 and in the rest of chapter II that would aggregate in one section of the Model Law all the rules as to the type of procurement methods to be used, irrespective of whether the procurement was for goods, construction or services. Such an approach, it was said, could be accommodated within the existing structure of the Model Law and would limit the extent to which that structure would be disturbed by the addition of services. It was agreed that the feasibility of such a unified approach would be tested as the Working Group proceeded with its review of the remainder of chapter II, including in particular the manner in which the conditions for use of the various procurement methods were formulated.

91. Turning to the substance of article 16 (3), the Working Group focused the discussion on possible ways in which the rules therein governing access to methods of procurement of services other than the special procedures in article 39 bis might be made tighter. As regards subparagraph (a), which indicated the conditions in which use of tendering for services would be permitted, it was suggested that the words "and tendering proceedings would be more appropriate taking into account the nature of the services to be procured" should be deleted, so as to render tendering mandatory when specifications were capable of being drawn up.

92. Similarly, it was suggested that in subparagraph (b), access to the three methods under article 17 needed to be tightened. The text before the Working Group reflected the decision taken at the sixteenth session that use of the methods under article 17 for procurement of services should not be subject to the conditions for use in article 17. It was suggested that, in view of the substantial level of detail added to article 39 bis at the current session, it would be appropriate to establish conditions for use of methods under article 17 methods for procurement of services. The main condition, though possibly not the exclusive one, would be the condition in article 17 (1) (a), non-feasibility of drawing up detailed specifications. Mention was also made of applying the condition in article 17 (1) (c) (national defence and security), as well as the condition in article 17 (2) (use of competitive negotiation in cases of urgency).

93. In the discussion, the possibility was raised that the development of article 39 bis had eliminated altogether the need for making the methods under article 17 available for procurement of services. It was observed in this regard that procedures in paragraphs (12) and (13) were very much akin to request for proposals and competitive negotiation respectively, thereby rendering paragraph (3) (b) of article 16 unnecessary. The Working Group was urged in this light to consider carefully that possible confusion and uncertainty might be caused for both legislatures and procuring entities if, for the procurement of services, the Model Law were to offer not only article 39 bis, which itself branched out into three different "selection procedures", but also the procurement methods under article 17, all of which the enacting State might conceivably enact into law.

94. After deliberations, there were prevailing views in the Working Group on the points that had been discussed. It was felt that paragraph (3) (a) should remain essentially in its current form, in recognition of possible cases in which it would be feasible to draw up detailed specifications yet in which tendering would nevertheless not be the most appropriate method. As regards paragraph (3) (b), the prevailing view was that the methods of procurement under article 17 should be available for the procurement of services. The Working Group did pause to consider whether it might be possible to forgo reference to request for proposals under article 38 by adding to article 39 bis a provision to the effect that the advertisement procedure did not confer the right to have a proposal evaluated. A provision of that type was applied by the Model Law in respect of the advertisement procedure in request for proposals (article 38 (2)). Such an approach was criticized, on the one hand, as counter to the intended open character of article 39 bis as the main method for procurement of services and, on the other hand, as unnecessary in view of the

threshold requirement in article 39 bis (11) (a). In the discussion, it was also stated that the need to retain the simple procedure of competitive negotiation for exceptional cases had been compounded by the development of article 39 bis into a relatively involved procedure. It was further pointed out that competitive negotiation was recognized under the GATT Agreement on Government Procurement. The Working Group did agree to modify the existing provision in paragraph (3) (b), however, to the extent that resort to the methods in article 17 would only be available if the conditions for use of those methods were fulfilled.

95. The Working Group considered but decided not to follow a proposal to move paragraph (4) of article 16 to article 11. That proposal was motivated by the desire to make the text more concise in view of the fact that record requirements were dealt with in detail in article 11. It was noted that the provision had been added at this point in the Model Law as adopted by the Commission in order to accord prominence to the record requirement, an intentionally repetitive style used elsewhere in the Model Law.

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

Paragraph (1)

96. A proposal was made to delete the reference in subparagraph (b) to the procurement of a prototype. It was pointed out that the requirement that the research contracts in question should be ones leading to the procurement of a prototype was added in order to bring such research contracts within the scope of the Model Law, which did not deal with services, the field in which research contracts could be said to properly fall. The Working Group agreed that, now that the scope of the Model Law would be expanded to cover services, the reference to procurement of a prototype was no longer appropriate, since research contracts could be let under the amended Model Law, either as contracts for the procurement of goods when a prototype was being developed, or otherwise as contracts for services. It was noted that a similar reference to prototypes with respect to research contracts awarded by way of single-source procurement could be deleted from article 20 (e).

97. The Working Group noted that the reference in subparagraph (d) to article 33 would be amended to refer to article 11 bis.

Paragraph (2)

98. No comments were made on paragraph (2).

Article 18. Conditions for use of restricted tendering

99. No comments were made on article 18.

Article 19. Conditions for use of request for quotations

100. No comments of a substantive nature were made with respect to article 19. The drafting group was requested, however, to review the existing formulation with a view to better fitting it to services.

Article 20. Conditions for use of single-source procurement

Paragraph (1)

101. The Working Group noted that the reference to the "unique nature" of the services had been added to subparagraphs (a) and (d) in an attempt to respond to the concern that had been raised about the need to convey the exceptional character, in the services context, of resort to single-source procurement on such grounds (A/CN.9/389, paras. 101-104). It was agreed, however, that the additional wording did not achieve the desired degree of clarity and should be deleted. A question was raised as to why the provision should single out services as having a possibly unique character, since a unique character could also be attributed in the case of goods or construction. It was also pointed out that the added words might not provide any additional meaning.

102. The Working Group noted that a reference to services would be added to subparagraphs (b) and (c). A question was raised as to the appropriateness of the notion of "compatibility" referred to in subparagraph (d) as a grounds for repeat procurement of services from a particular supplier or contractor.

Paragraph (2)

103. No comments were made on paragraph (2).

CHAPTER III. TENDERING PROCEEDINGS

Articles 21 to 24

104. No comments were made on articles 21 to 24, entitled: Domestic tendering; Procedures for soliciting tenders or applications to prequalify; Contents of invitation to tender and invitation to prequalify; and Provision of solicitation documents.

Article 25. Contents of solicitation documents

105. It was noted that, in paragraph (h), the words "goods or construction" would be replaced by the words "goods, construction or services".

Articles 26 to 35

106. No comments were made on articles 26 to 35, entitled: Clarifications and modifications of solicitation documents; Language of tenders; Submission of

tenders; Period of effectiveness of tenders; modification and withdrawal of tenders; Tender securities; Opening of tenders; Examination, evaluation and comparison of tenders; Rejection of all tenders; Prohibition of negotiations with suppliers or contractors; and Acceptance of tender and entry into force of the procurement contract.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. Two-stage tendering

107. The Working Group agreed with and referred to the drafting group a suggestion that paragraph (2) should provide that, if relevant, the solicitation documents should also seek the professional qualifications of the service providers.

108. With reference to paragraph (3), the Working Group agreed that it would be useful to clarify that the negotiations referred to were part of the first stage of the two-stage tendering.

Article 37. Restricted tendering

109. No comments were made on article 37.

Article 38. Request for proposals

110. The Working Group requested the drafting group, in both paragraphs (2) and (3) (a), to add the word "professional" so as to track the language in similar provisions.

Articles 39 to 41

111. No comments were made on articles 39 to 41, entitled: Competitive negotiation; Request for quotations; and Single-source procurement.

CHAPTER V. REVIEW

Article 42. Right to review

112. The Working Group agreed that, in paragraph (2) (a), it should be made clear that, in procurement of services, the choice of the selection procedure under article 39 bis, paragraph (10), would not be subject to review.

113. The Working Group also agreed that paragraph (2) (e) should also refer to article 39 ter.

Articles 43 to 47

114. No comments were made on articles 43 to 47, entitled: Review by procuring entity (or by approving authority); Administrative review; Certain rules applicable to review proceedings under article 43 [and article 44]; Suspension of procurement proceedings; and Judicial review.

Report of the Drafting Group

Article 2. Definitions

115. It was agreed that, in subparagraph (d) (definition of "construction"), there should be a reference to the value of the incidental services in line with the analogous provision in the definition of "goods".

Article 9. Form of communications

116. It was agreed that there should be cross-references to those provisions in the chapter on services to which article 9 (2) applied.

Article 11. Record of procurement proceedings

117. It was observed that paragraph (1) (d) needed to convey adequately that, as had been raised earlier in the discussion on article 11 (see para. 44), the procuring entity did not know the price in all instances, for example because the "price envelope" in the "two envelope" proposal had not been opened or because a price had not been formulated with respect to a given proposal. It was stated that the procuring entity would not always possess the information required to be recorded in accordance with paragraph (1) (d). After deliberation, the Working Group agreed to add the words along the lines of "if these are in fact known to the procuring entity" at the end of the paragraph.

Article 11 ter. Entry into force of the procurement contract

118. Noting its earlier decision to defer a decision on article 11 ter until after consideration of article 39 bis (see para. 47), the Working Group considered an observation that the reference in article 11 ter to "documents for solicitation" might be read as a reference to the term "solicitation documents" in tendering proceedings. Since such types of documents would not be present in all procurement proceedings, in particular in single-source procurement and in request for quotations, it was decided to use a more general term such as "at the time of requesting", so as to take account of those instances when solicitation might be done orally.

Article 39 bis. Solicitation of proposals

119. The Working Group agreed that the terms "invitation for proposals" and "invitation to prequalify" should be replaced with words along the lines of "notice seeking expression of interest in submitting a proposal or in prequalifying".

Article 39 ter. Contents of request for proposals for services

120. It was suggested that paragraph (d) was unnecessary as there was no need to specify the place, date or time for opening proposals in procurement of services. This was said to be the case since proposals would generally not be opened in the presence of suppliers or contractors. A proposal to require instead predisclosure of the expected time of conclusion of the selection process was not accepted on the ground that, in some of the selection procedures, particularly those that involved negotiations, it would be difficult to specify in advance when the selection process would end. Another suggestion made was to require predisclosure of the expected time of conclusion of the selection process for the procedure under article 39 sexies (2) and to require predisclosure of the expected time for opening of negotiations for the procedures under article 39 sexies (3) and (4). After deliberation, the Working Group decided to delete paragraph (d).

121. In paragraph (h), the Working Group decided to add the words "to the extent known" after the words "to be procured" to reflect the fact that the procuring entity would not in all instances be aware of the exact nature and full characteristics of the services required. Along the same lines, it was agreed that, since in some instances the procuring entity would in fact be seeking proposals as to possible means of meeting its needs, this possibility needed to be reflected.

122. It was pointed out that, since price was not always a relevant evaluation criterion in procurement of services, it should be made clear that paragraphs (j) and (k) only applied to the extent that the proposal price was a relevant criterion.

Article 39 quater. Criteria for the evaluation of proposals

123. The Working Group agreed that, in paragraph (1) (a), there should be a reference to the personnel of the procuring entity that would be involved in the provision of the services.

Article 39 sexies. Selection procedure

124. The Working Group agreed that there should be a provision regarding the requirement of recording the grounds and circumstances for the selection of a particular selection procedure in the procurement record.

125. In a further discussion of its earlier decision to include a provision on the use of selection panels (see paras. 74-76), the Working Group paused to consider whether paragraph (1) (b) should refer to the role the panel would have in the selection procedure. It was stated in this regard that practice differed from State to State as to whether selection panels only played an advisory role or could also perform a decision-making role in awarding the procurement contract. It was suggested that problems might arise were the Model Law to recommend an approach in contravention of the established procedures in the enacting State and that the matter might be left to the procurement regulations. After deliberations, the prevailing view was that the question of the exact role of selection panels should be left to the procuring entity. The Working Group

decided to retain the paragraph with only a change of the word "independent" to the word "impartial".

126. There was a prevailing view that paragraph (2) (a) should be redrafted to make it clear that both the establishment of a threshold level and the rating would be done in accordance with the criteria other than price for evaluating proposals; these criteria would encompass, in accordance with article 39 quater (1) (b), the effectiveness of the proposal in meeting the needs of the procuring entity.

127. In paragraph (2) (b) (ii), the Working Group decided to add words along the lines of "non-price" before the word "criteria".

128. The Working Group, resuming consideration of its earlier deliberations on the scope of negotiations under paragraph (4) (b) (see paras. 81 and 82), decided that at the current stage it would be preferable to drop the words "or other aspects". At the same time, it was suggested that it should be indicated to the Commission that the scope of the negotiations under article (4) (b) was an issue that it might wish to consider further.

129. The view was expressed that, as a matter of editorial presentation, the fact that the article under consideration presented the procuring entity with a choice among several procedures could usefully be highlighted by including editorial headings such as "alternative 1, etc." before each of paragraphs (2), (3) and (4).

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

130. It was agreed that in the chapeau of paragraph (1) (a) the test relevant to the procurement of services should be the non-feasibility of identifying the characteristics of the services to be procured in accordance with article 39 ter (h). In the discussion that accompanied this decision, it was observed that the reformulation might still leave open the question of the relationship to the rule in article 16 (3), in which one of the tests for the use of tendering for services in a given case was whether it was possible to formulate detailed specifications.

III. FUTURE WORK

131. Upon concluding its deliberations, the Working Group noted that the text of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services, reflecting the deliberations and decisions of the Working Group at the current session, would be transmitted to the Commission for consideration at its twenty-seventh session (New York, 31 May-17 June 1994). It was noted that that session would present an opportunity to consider further views that had been expressed at the current Working Group session, in particular as to the structure of the amendments to the Model Law, given that no final decision as to form had been made.

132. The Working Group noted the added importance that the Guide to Enactment would have in the light of the inclusion of provisions on procurement of services, since this was an area of rapid development and increasing importance, in which many legislatures and Governments had relatively limited experience. The Working Group noted that the short time available prior to the twenty-seventh session of the Commission might make it difficult for the Secretariat to prepare draft amendments to the Guide to Enactment taking into account the inclusion of services. At the same time, the Working Group expressed the hope that the draft amendments to the Guide to Enactment that would be presented to the Commission would be substantially complete in order to enable the Commission to adopt the amended Model Law and revised Guide to Enactment simultaneously.

Notes

1/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), annex I.

2/ Ibid., para. 262.

Annex

[Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services]

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement of goods, construction and services so as to promote the objectives of:

(a) maximizing economy and efficiency in procurement;

(b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;

(d) providing for the fair and equitable treatment of all suppliers and contractors;

(e) promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) procurement involving national defence or national security;

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so

declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

* * *

Article 2. Definitions

For the purposes of this Law:

(a) "procurement" means the acquisition by any means of goods, construction or services.

(b) "procuring entity" means:

(i) Option I for subparagraph (i)

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (the enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "goods" means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves; (the enacting State may include additional categories of goods);

(d) "construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself;

(d bis) "services" means any object of procurement other than goods or construction; (the enacting State may specify certain categories of services)

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfillment of any obligation referred to in article 30 (1) (f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

* * *

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement entered into by this State with an intergovernmental international financing institution, or

(c) agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

* * *

Article 4. Procurement regulations

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

* * *

Article 5. Public accessibility of legal texts

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement

covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

* * *

Article 6. Qualifications of suppliers and contractors

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

(i) that they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(ii) that they have legal capacity to enter into the procurement contract;

(iii) that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) that they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1) (b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers or contractors. A procuring entity shall impose

no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8 (1) and 32 (4) (d), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

(6) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false.

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete.

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

* * *

Article 7. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

(a) the following information:

(i) instructions for preparing and submitting prequalification applications;

(ii) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(iii) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(iv) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(v) any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings; and

(b) (i) in proceedings under chapter III, the information required to be specified in the invitation to tender by article 23 (1) (a) to (e), (h) and, if already known, (j);

(ii) in proceedings under chapter IV bis, the information referred to in article 41 ter (a), (c), if already known, (f), (g), (p) and (s).

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 8. Participation by suppliers or contractors

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

* * *

Article 9. Form of communications

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 11 bis (3), 29 (2) (a), 30 (1) (d), 32 (1), 35 (1), 37 (1), 41 bis (3) and 41 sexies 4(b) to (f) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the

communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

* * *

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

* * *

Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) a brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) the price or the basis for determining the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, if these are known to the procuring entity;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to articles 32 (4) (d) and 41 quater (2);

(f) if all tenders were rejected pursuant to article 11 bis, a statement to that effect and the grounds therefor, in accordance with article 11 bis (1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 13, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 16 (2) and (4) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(i bis) in the procurement of services by means of chapter IV bis, the statement required under article 41 sexies (1) (b) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;

(j) in procurement proceedings in which the procuring entity, in accordance with article 8 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(k) a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 31 (3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 31 (3), the portion of the record referred to in subparagraphs (c) to (g), and (k), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (k), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1) (e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

* * *

Article 11 bis. Rejection of all tenders, proposals, offers or quotations

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval), and) if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer, or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.

Article 11 ter. Entry into force of the procurement contract*

(1) In tendering proceedings, acceptance of the tender and entry into force of the procurement contract shall be carried out in accordance with article 35.

(2) In all the other methods of procurement, the manner of entry into force of the procurement contract shall be notified to the suppliers or contractors at the time that proposals, offers or quotations are requested.

* * *

Article 12. Public notice of procurement contract awards

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

* * *

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* Article 11 ter is new text.

Article 13. Inducements from suppliers or contractors

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

* * *

Article 14. Rules concerning description of goods, construction or services

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation or proposals, offers or quotations;

(b) due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

* * *

Article 15. Language

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) the procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. Methods of procurement

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20.

(3) In the procurement of services, a procuring entity shall use the procedures set forth in chapter IV bis, unless the procuring entity determines that:

(a) it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or

(b) it would be more appropriate(, subject to approval by...(the enacting State designates an organ to issue the approval),) to use a method referred to in articles 17 to 20, provided that the conditions for the use of that method are satisfied.

(4) The procuring entity shall include in the record required under article 11, a statement of the grounds and circumstances on which it relied to justify the use of a method of procurement pursuant to paragraphs (2) or (3) (a) or (b).

* * *

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 36, or request for proposals in

accordance with article 38, or competitive negotiation in accordance with article 39, in the following circumstances:

(a) it is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,

(i) it seeks tenders, proposals or offers as to various possible means of meeting its needs; or,

(ii) because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) when the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 11 bis, 13 or 32 (3), and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

* * *

Article 18. Conditions for use of restricted tendering

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 37, when:

(a) the goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured.

* * *

Article 19. Conditions for use of request for quotations

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods or services that are not specially produced or provided to the particular specifications of the procuring entity and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

* * *

Article 20. Conditions for use of single-source procurement

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 41 when:

(a) the goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed

procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in articles 32 (4) (c) (iii) or 41 quater (1) (d), provided that procurement from no other supplier or contractor is capable of promoting that policy.

* * *

CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 21. Domestic tendering

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) the procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders, the procuring entity shall not be required to employ the procedures set out in articles 22 (2), 23 (1) (h), 23 (1) (i), 23 (2) (c), 23 (2) (d), 25 (j), 25 (k), 25 (s) and 30 (1) (c) of this Law.

* * *

Article 22. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

* * *

Article 23. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain, at a minimum, the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided;

(c) the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(d) the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6 (1) (b);

(e) a declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8 (1), as the case may be;

(f) the means of obtaining the solicitation documents and the place from which they may be obtained;

(g) the price, if any, charged by the procuring entity for the solicitation documents;

(h) the currency and means of payment for the solicitation documents;

(i) the language or languages in which the solicitation documents are available;

(j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1) (a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(c) the currency and terms of payment for the prequalification documents;

(d) the language or languages in which the prequalification documents are available;

(e) the place and deadline for the submission of applications to prequalify.

* * *

Article 24. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

* * *

Article 25. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 32 (6);

(c) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) the nature and required technical and quality characteristics, in conformity with article 14, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;

(e) the criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 32 (4) (b), (c) or (d) and the relative weight of such criteria;

(f) the terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) if alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

(h) if suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) the currency or currencies in which the tender price is to be formulated and expressed;

(k) the language or languages, in conformity with article 27, in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) if a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) the manner, place and deadline for the submission of tenders, in conformity with article 28;

(o) the means by which, pursuant to article 26, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) the period of time during which tenders shall be in effect, in conformity with article 29;

(q) the place, date and time for the opening of tenders, in conformity with article 31;

(r) the procedures to be followed for opening and examining tenders;

(s) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 32 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(u) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) notice of the right provided under article 42 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 11 bis, a statement to that effect;

(y) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 35, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

* * *

Article 26. Clarifications and modifications of solicitation documents

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any

request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

* * *

SECTION II. SUBMISSION OF TENDERS

Article 27. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

* * *

Article 28. Submission of tenders

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 26, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope.

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality.

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

* * *

Article 29. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

* * *

Article 30. Tender securities

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such suppliers or contractors;

(b) the solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State);

(d) prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) the procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

(i) withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;

(ii) failure to sign the procurement contract if required by the procuring entity to do so;

(iii) failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest:

(a) the expiry of the tender security;

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) the termination of the tendering proceedings without the entry into force of a procurement contract;

(d) the withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

* * *

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 31. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

* * *

Article 32. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) if the supplier or contractor that submitted the tender is not qualified;

(b) if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) if the tender is not responsive;

(d) in the circumstances referred to in article 13.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(c) In determining the lowest evaluated tender in accordance with subparagraph (b) (ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction <u>or provision of the services</u>, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction <u>or services</u>;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional criteria)]; and

(iv) national defence and security considerations.

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 25 (s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 11 bis (1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

* * *

Article 33. Rejection of all tenders [moved to article 11 bis]

* * *

Article 34. Prohibition of negotiations with suppliers or contractors

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

* * *

Article 35. Acceptance of tender and entry into force of procurement contract

(1) Subject to articles 11 bis and 32 (7), the tender that has been ascertained to be the successful tender pursuant to article 32 (4) (b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 29 (1) or the period of effectiveness of tender securities that may be required pursuant to article 30 (1).

(4) Except as provided in paragraphs (2) (b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender,

provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 32 (4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 11 bis (1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

* * *

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. Two-stage tendering

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction or services as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 11 bis, 13 or 32 (3) concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with

this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 32 (4) (b).

* * *

Article 37. Restricted tendering

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 18 (a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 18 (b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 22, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

* * *

Article 38. Request for proposals

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

* * *

Article 39. Competitive negotiation

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

* * *

Article 40. Request for quotations

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

* * *

Article 41. Single-source procurement

In the circumstances set forth in article 20 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

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CHAPTER IV BIS. REQUEST FOR PROPOSALS FOR SERVICES*

Article 41 bis. Solicitation of proposals

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing a notice seeking expression of interest in submitting a proposal or in prequalifying, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain, at a minimum, the name and address of the procuring entity, a brief description of the services to be procured, the means of obtaining the request for proposals or prequalification documents and the price, if any, charged for the request for proposals or for the prequalification documents.

(2) The notice shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation except where participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1) or where, in view of the low value of the services to be procured, the procuring entity decides that only domestic suppliers or contractors are likely to be interested in submitting proposals.

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* The whole of chapter IV bis is new text.

(3) The procuring entity need not apply the provisions of paragraphs (1) and (2) of this article:

(a) where the services to be procured are available only from a limited number of suppliers or contractors that are known to the procuring entity, provided that it solicits proposals from all those suppliers or contractors; or

(b) where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) where, because of the nature of the services to be procured, economy and efficiency in procurement can only be promoted by means of direct solicitation, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice. The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any.

Article 41 ter. Contents of requests for proposals for services

The request for proposals shall include, at a minimum, the following information:

(a) the name and address of the procuring entity;

(b) the language or languages in which proposals are to be prepared;

(c) the manner, place and deadline for the submission of proposals;

(d) if the procuring entity reserves the right to reject all proposals, a statement to that effect;

(e) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7 (8);

(f) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(g) the nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services are to be provided and the desired or required time, if any, when the services are to be provided;

(h) whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;

(i) if suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;

(j) if price is a relevant criterion, the currency or currencies in which the proposal price is to be formulated or expressed;

(k) if the price is a relevant criterion, the manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(l) the method selected pursuant to article 41 sexies (1)(a) for ascertaining the successful proposal;

(m) the criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 41 quater (2), and the relative weight of such criteria;

(n) the currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(o) if alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;

(p) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(q) the means by which, pursuant to article 41 quinquies, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(r) the terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(t) notice of the right provided under article 42 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(u) any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(v) any other requirements established by the procuring entity in conformity with this law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

* * *

Article 41 quater. Criteria for the evaluation of proposals

(1) The procuring entity shall establish criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. Those criteria shall be notified to suppliers or contractors in the request for proposals and may concern only the following:

(a) the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of its personnel;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

(c) the proposal price, subject to any margin of preference applied pursuant to paragraph (2), including any ancillary or related costs;

(d) the effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of (this State), the extent of participation by local suppliers and contractors, the encouragement of employment, the economic development potential offered by the proposal, the development of local expertise, (... (the enacting State may expand subparagraph (d) by including additional criteria));

(e) national defence and security considerations.

(2) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services, which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

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Article 41 quinquies. Clarification and modification of requests for proposals

(1) A supplier or contractor may request a clarification of the request for proposals from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the request for proposals that is received by the procuring entity within a reasonable time prior to the deadline for the submission of proposals. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its proposal and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the request for proposals.

(2) At any time prior to the deadline for submission of proposals, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the request for proposals by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the request for proposals and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable those suppliers or contractors to take the minutes into account in preparing their proposals.

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Article 41 sexies. Selection procedures

(1) (a) The procuring entity, in ascertaining the successful proposal, shall use the procedure provided for in paragraph (2), (3) or (4) of this article that has been notified to suppliers or contractors in the request for proposals.

(b) The procuring entity shall include in the record required under article 11, a statement of the grounds and circumstances on which it relied

to justify the use of a selection procedure pursuant to paragraph (1) (a) of this article.

(c) Nothing in this chapter shall prevent the procuring entity from resorting to an impartial panel of experts in the selection procedure.

(2) (a) If the procuring entity uses the procedure provided for in this paragraph, it shall establish a threshold level with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of that criteria as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold level.

(b) The successful proposal shall then be:

(i) the proposal with the lowest price; or

(ii) the proposal with the best combined evaluation in terms of the criteria other than price referred to in subparagraph (a) of this article and the price.

(3) (a) If the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(b) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(c) In the evaluation of proposals, the price of a proposal shall be considered separately and only after completion of the technical evaluation.

(d) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals as well as with the relative weight and manner of application of those criteria as set forth in the request for proposals.

(4) If the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure:

(a) establish a threshold level in accordance with paragraph (2)(a) of this article;

(b) invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with paragraph (2)(a) of this article;

(c) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiation if the negotiations with the suppliers or contractors with better rating do not result in a procurement contract;

(d) inform the other suppliers or contractors that they did not attain the required threshold level;

(e) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (4)(b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations;

(f) the procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

Article 41 septies. Confidentiality

The procuring entity shall treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors. Any negotiations pursuant to paragraph article 41 sexies (3) or (4) shall be confidential and, subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

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CHAPTER V. REVIEW*

Article 42. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 43 to [47].

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* States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 16 to 20;

(a) bis the selection of the evaluation procedure in a request for proposals for services pursuant to article 41 sexies;

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) a decision by the procuring entity under article 11 bis to reject all tenders, proposals, offers or quotations;

(d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 38 (2);

(e) an omission referred to in article 25 (t) or article 41 ter (s).

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Article 43. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, as the case may be.)

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [44 or 47]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [44 or 47].

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Article 44. Administrative review*

(1) A supplier or contractor entitled under article 42 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 43 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 43 (5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 43 (4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 43, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

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* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 44 and provide only for judicial review (article 47).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 47.

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* Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

Article 45. Certain rules applicable to review proceedings under article 43 [and article 44]

(1) Promptly after the submission of a complaint under article 43 [or article 44], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

* * *

Article 46. Suspension of procurement proceedings

(1) The timely submission of a complaint under article 43 [or article 44] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 44 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or

commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

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Article 47. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 42 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 43 [or 44].

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